Supreme Court, U.S.
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No. ——

In The
Supreme Court Of The United States

October Term, 2009

MICHAEL L. MONTALVO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United StatesCourt of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD B. MAZER
Law Offices of Richard B. Mazer
99 Divisadero Street
San Francisco, California 94117
(415) 621-4100

Attorney for Petitioner

QUESTIONS PRESENTED

Is the offense stated in 21 U.S.C. § 848(b), punishable by mandatory life imprisonment, a separate and greater offense from the basic crime of operating a continuing criminal enterprise otherwise stated in 21 U.S.C. § 848 ?

Is a sentence of mandatory life imprisonment, imposed pursuant to an offense for which a criminal defendant was neither charged by indictment nor convicted by jury, an illegal sentence in violation of due process, which must be vacated with the case remanded for a new sentencing hearing?

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than the parties named in the caption to this petition, who are Michael L. Montalvo and the United States of America.

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Petitioner, Michael L. Montalvo, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was a published opinion, *United States v. Montalvo,* 581 F.3d 1147 (9th Cir. 2009) (Appendix A, App. 1a), and the order denying the petition for rehearing and suggestion for rehearing en banc was unpublished (Appendix D, App. 28a). The order of the district court in granting judgment against petitioner, incorporating the magistrate judge's findings and conclusions (Appendix C, App. 18a), was an unpublished order (Appendix B, App. 16a).

STATEMENT OF JURISDICTION

The published opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") denying the petitioner's appealability (App. 1a) was filed on September 16, 2009. The Court of Appeals denied a petition for rehearing on December 10, 2009 (App. 28a). On March 1, 2010, Justice Kennedy granted an extension of time until April 26, 2010 to file this petition for writ of certiorari.

The jurisdiction of this Court to grant a

petition for writ of certiorari is invoked under 28 U.S.C. § 1254(l). The district court had jurisdiction under former Fed.R.Crim.P. 35(a) (1985). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor; and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS:

Title 21 U.S.C. § 848, Continuing Criminal Enterprise, provides in pertinent part:
[Note: 21 U.S.C § 848 has been amended several times, and these excerpts cover the time period for petitioner was alleged to being the enterprise, as well as the version of the statute applied by the sentencing court in 1994.]

(a) Penalties: forfeitures. [October 12, 1984]
Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which my be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a terms of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in section 853 of this title.
(Public Law 91-513, October 27,1970)

(a) Penalties: forfeitures. [October 27,1986)
Any person who engages in a continuing criminal

enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which my be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a terms of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.
(Public Law 99-570, Anti-Drug Abuse Act of October 27, 1986)

(b) "Conditions for a life imprisonment for engaging in a continuing criminal enterprise"

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section if:
(I) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders, and
(2)(A) the violation referred to in subsection (c)(I) of this section involved at least 300 times the quantity

of a substance described in section § 841(b)(I)(B) of this title,
(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve month period of its existence for the manufacture, importation, or distribution of a substance described in section § 841(b)(l)(B) of this title.
(Public Law 99-570, Anti-Drug Abuse Act of October 27, 1986)

(c) "Continuing criminal enterprise defined"
[Note: this subsection was in Title 21 U.S.C. § 848 (b) from October 27, 1970 to October 12, 1984. However, On October 27, 1986 the same definition was moved to § 848(d) then later to (c), and is set forth here as subsection (c)]:

For purpose of subsection (a) of this section, a person is engaged in a continuing criminal enterprise, if
(I) he violated any provision of this subchapter or subchapter 11 of this chapter, the punishment for which is a felony, and
(2) such violation is part of a continuing series of violations of this subchapter--

(A) which are undertaken by such persons in concert with five of more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(Public Law 99-570, Anti-Drug Abuse Act of October 27, 1986)

(d): Suspension of sentence and probation prohibited; In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 and the Act of July 15, 1932. (D.C. Code. Sees, 24-203 to 24-207) shall not apply.

(Public Law 91-513, October 27, 1970; Public Law 99-750, October 27, 1986; "and section 4202 of title 18" deleted November I, 1987)

STATEMENT OF THE CASE

The question raised in this petition is whether it is illegal for a criminal defendant to be sentenced to mandatory life in prison for an offense which was not charged by indictment nor was considered by the trial jury in reaching its verdict.

Petitioner Michael L. Montalvo, a federal prisoner who has served over twenty-two years of a life sentence, submits that the Ninth Circuit decision in this case seemingly answers this question in the affirmative, in violation of long-standing tenets of this Court and other circuits of the Courts of Appeal.

The fundamental constitutional principles of due process and a fair trial to be sentenced only for the offense of conviction are completely violated by the Ninth Circuit opinion in this case. The Ninth Circuit's opinion completely ignores the long-standing rule of this Court, and every other federal circuit, that there is a fundamental difference between a sentence imposed under a mandatory sentence in one offense and the same sentence imposed within the statutory maximum of a discretionary sentencing range of another statute.

Although the procedural mechanism for correcting the illegality of the sentence, former Fed.R.Crim.P. 35(a), is currently applicable only to the small number of federal prisoners still incarcerated on Continuing Criminal Enterprise convictions over twenty years old, the underlying constitutional issues are significant.

This petition also presents an opportunity to clarify and harmonize a disagreement within the circuits of the Court of Appeals as to whether the

conduct set forth in 21 U.S.C. § 848(b), establishes a separate, more serious, offense than the regular Continuing Criminal Enterprise offense under 21 U.S.C. § 848. Petitioner submits that there is sufficient division between the circuits to warrant this Court's consideration of the issue of whether section 848(b) of the Continuing Criminal Enterprise statute is a separate criminal offense that must be charged in the indictment and found by the trial jury.

Petitioner submits that a long line of precedent of this Court establishes that the Ninth Circuit's decision was clearly erroneous, and that fundamental notions of due process require that Mr. Montalvo finally be given a full and fair sentencing hearing, and respectfully requests this Court to grant review in this case.

A. Background of the Criminal Conviction.

On March 19, 1989, Mr. Montalvo was charged in a two-count indictment in the Eastern District of California. He and several other defendants were charged in Count One with conspiracy to possess with intent to distribute an unspecified amount of cocaine between 1982 and 1987, in violation of 21 U.S.C. § 846. In Count Two, Montalvo alone was charged with operating a continuing criminal enterprise (referred to as CCE), in violation of 21 U.S.C. § 848. After the CCE count, there was a list of 12 overt acts from 1983 to June 30, 1986, and a thirteenth act in November 1986, entitled "series of violations". Mr. Montalvo was informed before trial that he was facing a minimum

mandatory ten-year sentence. The indictment did not mention § 848(b) or a possible mandatory life sentence, nor did the indictment allege any of the requisite facts to establish the essential elements of the offense required under § 848(b).

Petitioner Montalvo and two codefendants went to jury trial in 1989. At trial, the primary evidence presented by the government was the testimony of three cooperating coconspirator witnesses who alleged drug acts occurring from 1983 through June 30, 1986. Petitioner Montalvo testified in his defense and denied the allegations in the indictment.

The jury was instructed to first determine if Montalvo committed the series of violations for a CCE before it determined if he committed the conspiracy count. The jury was not instructed to determine any drug quantities or dates of any offense. Nor were they instructed to specifically and unanimously agree which acts were committed by any defendant to comprise the "series of violations" for the continuing criminal enterprise. On October 19, 1989, Mr. Montalvo was convicted by jury verdict of 21 U.S.C. § 848.

The trial judge retired before sentencing. He was replaced by the Honorable Dickran M. Tevrisian, a visiting judge from Central District of California, for sentencing. Judge Tevrisian imposed a "discretionary" life sentence on Mr. Montalvo under § 848(a). In so doing, Judge Tevrisian said he was basing the sentence solely on the face of the indictment and without reference to the sentencing guidelines, ranges which were 121 to 151 months for this type offense and offender, or consideration of the

pre-sentence report.

On direct appeal, the Ninth Circuit Court of Appeals, in an unpublished opinion, vacated the sentences for Montalvo and his trial co-defendant Matsuzaki, and remanded them because "the district court was not sufficiently aware of the facts in each case." The court stated "[t]here is no reason to doubt that the sentencing judge will now impose sentence on the basis of the proved facts." *United States v. Montalvo* (Montalvo I), Nos. 90-10080, 1992 WL 184342, at *9 (9th Cir. Aug.4, 1992).

On January 14, 1994, the original sentencing judge, Judge Tevrizian, held a hearing to resentence Mr. Montalvo. The defendant argued for a ten-year sentence based on the remand order from the Ninth Circuit that sentence be based on the proved facts, the general jury verdict without drug quantity, and based on the informants' testimony to acts between 1983 and June 30, 1986. Mr. Montalvo reminded the court that there was no testimony to any drug offense after June 30, 1986 at trial. RT (1-14-1994) pp 59-60, 83, 129. However, the sentencing judge essentially adopted the government's sentencing memorandum and imposed a mandatory life sentence under § 848(b). It is clear from the transcript of the 1994 resentencing hearing that the sentencing judge based Mr. Montalvo's mandatory life sentence on additional alleged offenses and drug quantity in the government's sentencing memorandum which were not charged by indictment nor found by a unanimous jury verdict with regard to the continuing criminal enterprise.

In imposing sentence, Judge Tevrizian quoted the government's sentencing memorandum that

stated incorrectly that "in 1985, you grossed over $68 million from cocaine sales" which was not in mentioned in Montalvo's trial or prior sentencing. The district court relied on these additional alleged facts in order to impose the "mandatory" life sentence under § 848(b). RT 83 (11-14-1994).

B. The Rule 35(a) Proceedings In District Court.

On February 21, 2007, Mr. Montalvo filed the current motion pursuant to former Fed.R.Crim.P. 35(a)(1985) to correct an "illegal sentence at any time," and amended it on May 4, 2007[1]. This claim was based in part on the cases of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2005), and claimed that the sentence was illegal because the judge sentenced him for an offense that was not considered by the jury. The Rule 35(a) claim was not a habeas proceeding, and was therefore not constricted by any of the rules for procedural default that exist in habeas proceedings, such as the one-year statute of limitation or non-retroactivity limitations set forth in 28 U.S.C. § 2255.

On August 7, 2007, the district court dismissed the Rule 35(a) motion, stating in part that petitioner Montalvo's

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[1] In *Heflin v. United States*, 358 U.S. 415,418 (1959), this Court held that "successive motions may be made under Rule 35." That Court held that former Fed.R.Crim.P. 35(a) motion to correct an illegal sentence was proper to argue "the sentence imposed was illegal on its face."

claim that a sentence imposed in violation of the Fifth and Sixth Amendments was, at best, imposed in an illegal manner and not an "illegal sentence" under Rule 35(a). Thus, the motion was required to be filed within 120 days of the finality of the appeal, and the district court lacked jurisdiction on these issues. Petitioner Montalvo timely filed a notice of appeal.

C. The Rule 35(a) Appeal Proceedings

On appeal, petitioner Montalvo argued:

1. By sentencing defendant to mandatory life imprisonment without possibility of parole under 21 U.S.C. § 848(b), the court exceeded its jurisdiction since defendant was not indicted or convicted for the underlying substantive offenses to authorize § 848(b), and Rule 35(a) is available to correct an illegal sentence based on the face of the indictment.

2. Imposition of a mandatory life sentence under 21 U.S.C. § 848(b) for other felonies never charged by indictment counts nor instructed and determined by a jury, was structural error that requires automatic reversal of unconstitutional sentence.

3. The sentence was imposed in violation of the constitution because the judge alone, not the jury, determined the disputed factual findings necessary to establish a § 848(b) violation.

4. At resentencing, the district court should impose a sentence not greater than twenty years imprisonment for the continuing criminal enterprise conviction, when the alleged underlying predicate felony and series of violations in furtherance of the

criminal enterprise were not charged as separate counts in the indictment.

On September 16, 2009, the Ninth Circuit panel affirmed the district court's denial of the Rule 35(a) (App. 1a), but it "assumed" § 848(b) is a separate offense. Instead of vacating the illegal sentence for a § 848(b) offense and remanding the case for a new sentencing hearing, the panel held that; 1) there is no material difference between the 'discretionary' life term authorized by 21 U.S.C. § 848(a) and the 'mandatory' life term authorized by section 848(b)(App 11a); 2) defendant could not challenge the "process" or "illegal manner" by which the sentence was imposed under Rule 35(a); and 3), Rule 35(a) did not permit defendant to raise the argument that the district court erred in finding facts relevant to the sentence without submitting those facts to the jury, because that is an "illegal manner," The panel held petitioner could not raise such a processed-based challenge in a Rule 35(a) motion which had to be brought within 120 days of his resentencing in 1994.

Petitioner Montalvo filed for rehearing *en banc*, arguing that the panel's decision conflicted with the precedent of the Ninth Circuit and the Supreme Court when it held there was no material difference between a "discretionary" life sentence and a "mandatory" life sentence; the panel's decision, that a sentence imposed for an offense that was never charged in the indictment nor found by the jury verdict is not an illegal sentence, in conflict with precedents of the Ninth Circuit and other federal circuit; the panel's decision conflicted with Ninth

Circuit precedent that Rule 35(a) was proper to correct a sentence based on materially false and unreliable information, and the case must be remanded for resentencing because the defendant has never received a legal sentence and the mandate of this court for a full sentencing hearing was ignored at the resentencing hearing. On December 10, 2009, the panel summarily denied rehearing and rehearing *en banc* to resolve the conflicts of this opinion with the Supreme Court and other circuit.

On March 1, 2010, Justice Kennedy ordered that the petition for writ of certiorari be filed by April 26, 2010.

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted Because This Case Presents An Opportunity To Resolve A Division Among The Federal Circuits As To Whether 21 U.S.C. § 848(b) Is A Separate Greater Offense From The Main Continuing Criminal Enterprise Offence Set Forth In 21 U.S.C. § 848.

The criminal statute at issue in this case is 21 U.S.C. § 848, Continuing Criminal Enterprise. In essence, this statute creates a separate offense for a defendant found to be operating or managing a drug conspiracy in which he organizes, supervises or manages five or more persons and from which the defendant derives substantial income. The punishment for this offense is ten years to life

imprisonment. In addition, subsection (b) of § 848 sets forth additional factual elements stating that a person who is a leader of the continuing criminal enterprise that distributes over 300 times the quantity of a drug needed to establish the mandatory minimum sentences under 21 U.S.C. § 841(b) or that derives over $10 million in gross receipts from drug sales during any twelve-month period of the enterprise is subject to mandatory life imprisonment. Petitioner maintains that § 848(b) is a separate greater offense from the main offense set forth in 21 U.S.C. § 848.

In the last decade, this Court has issued several opinions that clearly establish the principle that a jury must find every essential element of an offense beyond a reasonable doubt in order for the sentencing court to apply an enhanced statutory penalty based on those essential elements. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2005)(discussed *infra*). In this case, the Ninth Circuit ignored the issue by "assuming" that 21 U.S.c. § 848(b) is a separate, and greater, offense within the definition of a continuing criminal enterprise. Petitioner submits that this Court should address this issue in order to bring uniformity to an important area of federal criminal law.

There is a split in the circuits as to whether 21 U.S.C. § 848(b) is a separate offense from the lesser included basic § 848(c) offense, and must be charged by indictment count with the required predicate felony violation and drug quantity which must be instructed to the jury to be determined by a specific

and unanimous jury verdicts before the sentencing court is authorized to impose the § 848 life sentence "without possibility of parole." The Second Circuit holds § 848(b) is a separate offense, and two circuits hold it is "sentencing enhancement" with factors the judge alone may determine in his discretion to then impose a mandatory life sentence.

Imposition of a "mandatory life" sentence based on a sentencing judge's unfettered discretionary findings of additional uncharged felony violations and hearsay drug quantities to trigger 21 U.S.C. § 848(b) "conditions for a life sentence" is a reoccurring error in most circuits and a conflict with this Court's precedents in *Richardson v. United States*, 526 U.S. 813 (1999), and *Jones v. United States*, 526 U.S. 227 (1999).

The Supreme Court's supervision is needed because of the split in the circuits whether a judge can use his discretion to determine the additional felony violations and elements for § 848(b) offense sentence to then impose a "mandatory" life sentence "without possibility of parole" or a "discretionary" sentence of ten years to *possible* life sentence under (a), while the Sentencing Guidelines advise a far less range for that same offense and type of offender.

The circuits are also divided on whether the judge alone or the jury determines the statutory elements or factors in § 848(b) which mandates the district court to impose the sentence of life that was otherwise prescribed at the top end of the discretionary statutory range in § 848(a) that authorized a ten year (or twenty year) sentence to a *possible* life sentence. Whether § 848(b) is a *sentence enhancement* implicates the Fifth and Sixth

Amendments, and the line Supreme Court precedent from *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2005).

Blakely v. Washington held:

> the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment (citation omitted), and the judge exceeds his proper authority.

Id. at 303-304.

In *United States v. Torres*, 901 F.2d 205, 240 (2d Cir. 1990), the Second Circuit held that 21 U.S.C. § 848(b) "requires the jury to find, beyond a reasonable doubt, elements in addition to those stated in section § 848(a) ... [thus], section 848(b) result[s] in a new offense rather than a sentence enhancement." Since a violation of § 848(b) constitutes a new offense rather than a sentence enhancement, the critical statutory factor-role and drug-quantity-must be found by a jury. *See also United States v. Givens*, 2008 WL 2796341 (2d Cir. July 18,2008) (unpublished opinion), vacating the § 848(b) mandatory life sentence because it was a separate offense, and remanding for resentencing. At resentencing the court imposed 360 months for § 848(a) consistent with the Sentencing Guideline.

In conflict with the Second Circuit, the Third, Seventh and Eighth circuits hold that § 848(b) is

merely a sentencing enhancement. *United States v. Tidwell*, 521 F.3d 236,248 (3rd Cir. 2008); *United States v. Hill*, 252 F.3d 919, 921 (7th Cir. 2001); *United States v. Jackson*, 345 F.3d 638, 647 (8th Cir. 2003). These cases state section 848(b) does not contain substantive elements that must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt, but rather embodies a sentencing enhancement that is within the purview of the judge. *Tidwell*, *Jackson* and *Hill* appear to conflict with this Court's ruling in *Blakely v. Washington*. *Blakely* held the Sixth Amendment prohibits a sentencing judge from "inflict[ing] [a mandatory life sentence under § 848(b)(ADAA)] that the jury verdict alone [for § 848(c)] did not allow, [because] the jury has not found all the facts 'which the law makes essential to the punishment (citation omitted) and the judge exceeds his proper authority. See, *Id.* 542 U.S. at 303-304. Thus, the imposition of § 848(b) mandatory life sentence without indictment or a jury verdict for it is a violation of the Fifth and Sixth Amendments under *Blakely*.

Only if the specific conditions precedent of § 848(b) are fulfilled by indictment count and a jury determination may a sentence of mandatory life imprisonment be imposed on the defendant. Thus, even if § 848(b) is a sentence enhancement, its elements of role, quantity, and gross proceeds within one year, must be determined by a specific and unanimous jury verdict, or the basic sentence advised by the U.S.S.G. § 2D.I.5 would guide the sentence imposed.

Apprendi v. New Jersey, supra, should also be applicable to §848(b) to require a jury determination

of facts that create a mandatory life sentence without possibility of parole. This is not incompatible with *Harris v. United States*, 536 U.S. 545 (2002). In both *Harris* and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the graduated penalty schemes under consideration increased the mandatory minimum sentence but did not increase the statutory maximum penalty. While such penalty schemes can be in the sentencing court's discretion, they do not eliminate it entirely as does § 848(b). Moreover, the Court in *Apprendi* limited the reach of *McMillan* "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi, supra,* 530 U.S. at 487 n.13. *See Harris, supra*, at 536 U.S. 563. A statutorily required mandatory maximum life sentence as a minimum sentence is, under *Lindsey v. Washington*, 301 U.S. 391, 401 (1937), more severe than a non-mandatory statutory range from ten years (or twenty) to the possibility of life imprisonment, or the non-mandatory sentencing range produced by the advisory U.S.S.G. § 2D1.5 for CCE offense verdicts, because the sentencing court is powerless to ameliorate a mandatory sentence enhancement to life imprisonment, no matter how compelling the circumstances, through exercise of its departure powers.

Finally, it should be noted that any bar to retroactive application of *Apprendi* is limited to habeas proceedings. In the rare old case, such as here, where former Fed.R.Crim.P. 35(a) still applies, there is no bar to retroactivity as a motion to correct an illegal sentence may be brought at any time.

Although petitioner Montalvo disagrees that the § 848(b) statute is merely a "sentencing enhancement", the imposition of § 848(b) sentence in this case shows that the "sentence enhancement theory" violates the Fifth and Sixth Amendments, and makes such a penalty an "illegal sentence".

Some courts hold the life sentence for a CCE is only available when § 848(b) is charged by indictment and found by jury verdict. Those courts hold that a verdict is required for specific drug felonies, drug quantity, or money offense felony and amounts. In *United States v. Elgersma,* 929 F.2d 1538, 1401 (11th Cir. 1991) the court noted that the life sentence was not available for the CCE count:

> [T]he government conceded that it had not sufficiently pled the elements necessary for life in prison under section § 848(b), but that the charges nonetheless made out the substantive continuing criminal enterprise offense, which appears in section § 848(c) and is subject to the general sentencing provision of section § 848(a).

United States v. Elgersma at 929 F.2d 1401. See also, *United States v. Singleton*, 177 F.Supp.2d 31,39 (D.D.C. 2001); *United States v. Arzola-Amaya*, 867 F.2d 1504, 1506 (5th Cir. 1989). In the D.C. Circuit, the prosecutors specifically charge violations of § 848(b) if they intend to seek a life sentence for the CCE offense. *United States v. Edmond*, 52 F.3d 1080, 1084 (D.D.C. Cir. 1995). The Tenth Circuit has instructed the jury to specifically determine the elements of § 848(c) and § 848(b)(ADAA) for role and drug quantity in § 848(c)(I). *United States v. Atencio*,

435 F.3d 1222, 1230 (10th Cir. 2006)

When the scope of the permitted penalty is unclear, the canons of statutory construction require courts to interpret criminal statutes is such a way as to resolve ambiguity in favor of a defendant. *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Ladner v. United States*, 358 U.S. 169, 178 (1958) stating the general rule). The variety of interpretations of the conditions or grounds that authorize the "discretionary" or "mandatory" life sentence under § 848(a) or (b) demonstrate there is ambiguity, and "the canons of statutory construction require courts to interpret criminal statutes is such a way as to resolve ambiguity in favor of a defendant," *Bifulco, id.*, and § 848(b)" should be held a separate offense.

In *Jones v. United States*, 526 U.S. 227,229 (1999) this Court held that federal carjacking statute, 18 U.S.C. § 2119 defined three separate offenses by specification of distinct elements, each of which had to be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict-rather than defining a single crime with choice of three maximum penalties. In *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) this Court held "murder plus one or more aggravating circumstances" is a separate offense from "murder" *simpliciter*, implicating the Fifth and Sixth Amendments.

If § 848(c) and (b) are a single offense which allow a judge to impose a discretionary or mandatory life sentence, Congress would have not needed to enact (b). It would appear that Congress intended § 848(b) to be a separate offense with the only "conditions for life imprisonment" as the title states.

Indictments and verdict for § 848(c) are subject under § 848(a) to a minimum ten years (or twenty years) up to less than life imprisonment, which is reserved for § 848(b)(ADAA) offenses.

In *Richardson v. United States*, 526 U.S. 813 (1999) this Court defined the term "violations" within the CCE statute as separate felonies and that the CCE statute requires jury unanimity in respect to each individual "violation." This Court should apply the same reasoning from *Richardson v. United States* in determining whether the elements of § 848(b) are a "separate offense". If § 848(b) is a separate offense, then such violations must be each charged by indictment counts and each instructed to the jury to be each determined by a unanimous verdict.

Logically, if the government wants a life sentence for a CCE, the § 848(b) statute should be charged, and the question put to the jury in every CCE case should be: first, whether the defendant was found guilty of all the elements and violations for the basic CCE offense defined in § 848(c), then second, if defendant was: "the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders," and that the felony "violation referred to in subsection (c)(I) involved at least 300 times the quantity of a substance described in subsection § 841(b)(I)(B) offense," or that "the enterprise or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve month period of its existence for the

manufacture, importation, or distribution of a substance described in section § 841(b)(I)(B) of this title."

The "penalties" in § 848(a) authorizing for ten year to possible life should be read "*in pari materia*" with § 848(b), the sentencing guideline § 2D 1.5 for CCE penalty ranges, the legislative intent of the Sentencing Reform Act, 18 U.S. § 3553(a)("factors to be considered in imposing sentence"), (a)(6) ("the need to avoid unwarranted disparities amount defendant with similar records who have been found guilty of similar conduct"), (b)("the applicable guidelines in imposing sentence"), and the decision of the Supreme Court in *Richardson v. United States*, 526 U.S. 813, 820 (1999) interpreting the terms of separate felony violation to constitute the CCE offense that must be charged and determined by a jury in specific and unanimous verdicts that the defendant committed.

Petitioner submits that a life sentence without possibility of parole under § 848(b), without a specific and unanimous verdict for the § 848(b) factual elements, is an "illegal sentence" *per se* and a violation and of the Fifth and Sixth Amendments that should be able to be corrected by a proper post-conviction motion, rather than barred as a sentence imposed in an "illegal process" or "manner" subject to waiver and procedural default if not promptly objected to and appealed.

Certiorari should be granted in this case. The circuits are split on whether § 848(b) defines a separate greater offense that must be charged and proved by unanimous verdicts before a life sentence is authorized under § 848(a) to be imposed.

II. The Ninth Circuit Opinion Conflicts With This Court's Prior Rulings On The Essential Constitutional Difference Between A Sentence Imposed As A Mandatory Sentence and A Sentence Imposed Within A Discretionary Sentencing Range.

The question of whether the Ninth Circuit was erroneous in holding that there was no material difference between the "discretionary" life term authorized by [21 U.S.C.] § 848(a), and the "mandatory" life term authorized by section 848(b)" is an issue that this Court should resolve by granting certiorari in this case. Petitioner submits that this is a crucial issue for the Court to consider because the validity of many past and future "life sentences" for Continuing Criminal Enterprise offenses hinges on determination of this question, and this Court's supervision is needed because the same criminal statute is being applied differently depending on the circuit.

This Court should grant certiorari in this case because the constitutional violation to petitioner is that he was sentenced for an offense he was not convicted of nor charged. The § 848(b) sentence of "mandatory" life was imposed by a judge alone without indictment counts or jury verdicts for the § 848(b) offense. The sentence should have been based upon the general jury verdict for the lesser § 848(c) elements that carried a range of ten years to a *possible* life sentence.

Supreme Court precedent clearly establishes that there is a material difference between a

discretionary sentence and a mandatory sentence of the same length. In *Lindsey v. Washington,* 301 U.S. 397 (1937), the Court ruled that a sentencing law violates the constitution if its effect "is to make mandatory what was before only the maximum sentence." In *Lindsey,* the defendant was convicted of grand larceny, an offense with a punishment of six months to fifteen years. Before sentencing, the legislature changed the punishment to mandate a fifteen-year sentence for the same offense. The trial court then imposed mandatory fifteen years pursuant to the new law. *Id.* at 398-399. Although a sentence of fifteen years was authorized by the old statutes, this Court held the new law, which eliminated the trial court's discretion to impose a lesser sentence, imposed a more severe punishment and violated the *Ex Post Facto* Clause of the Constitution.

Lindsey v. Washington, held that

> "[T]he *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather that to the sentence actually imposed ... It is this reason that an increase in the possible penalty is ex post facto [citation omitted] .... Regardless of the length of the sentence actually imposed ... Removal of the possibility of a sentence of less than 15 years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standards of punishment adopted by

> the new statute is more onerous than that of the old. It could hardly be thought that, if the punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. [citation omitted] Yet this is only a more striking instance of the detriment which ensues form the revision of a statute providing for a maximum and minimum by making the maximum compulsory. We need not inquire whether this is technically an increase in the punishment annexed to the crime. [citation omitted] It is plainly the substantial disadvantage of the petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of their 15 years term."
>
> 301 U.S. at 401-402

As in *Lindsey,* "we need not inquire whether [a "mandatory" life under § 848(b)(ADAA) compared to the § 848(a) "discretionary" life] is technically an increase in the punishment annexed to the crime." 301 U.S. at 401. In this case, when a general guilty verdict for Section 848 was returned by the jury, the defendant should have had an opportunity to argue for the 121 to 151 months sentence range under the advisory sentencing guidelines for the same offense, and to raise other mitigating factors to convince the

court to impose a sentence as low as the ten year minimum. Thus, a "mandatory" sentence imposed under § 848(b) by the sentencing judge, as here, is a much more severe sentence than the "discretionary" § 848(a) sentence of the same length because it removes the defendant's opportunity to seek and receive a sentence far less than life in prison.

The *Lindsey* "standard of punishment" prescribed by § 848(b) to automatically' impose a minimum mandatory life sentence without possibility of parole based on the arbitrary and disputed judicial findings of additional uncharged felonies by the sentencing judge is more onerous than the "discretionary" sentencing range of § 848(a) from ten years to the possibility of life which a defendant has an opportunity to receive a sentence far less than life.

The Supreme Court reaffirmed the Constitutional principle from *Lindsey* in *Weaver v. Graham*, 450 U.S. 24, 32 n.17 (1981), when the Court held "a law may [violate the Constitution] not only if it alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory" (citing to *Lindsey v. Washington, supra*).

This Court should reaffirm and apply the *Lindsey v. Washington* and *Weaver v. Graham* holdings that there is a substantial, material, and constitutional difference between a "discretionary" sentence range of ten years (or twenty years) to a possible life sentence under § 848(a), and a "mandatory" minimum sentence of life under § 848(b). Under *Lindsey* and *Weaver*, the mandatory life sentence for a verdict or guilty plea for a

violation of § 848(c) violates the constitution under the Due Process Clause and the right to a unanimous jury verdict clause. A sentence imposed in violation of the Constitution is an "illegal sentence." An "illegal sentence" is a "plain error," and visa versa. It was not only a "plain error" to impose a § 848(b) "mandatory" life sentence without an indictment, trial, guilty plea or conviction, it was an "illegal sentence" in a violation of the constitution under the Fifth and Sixth Amendments, which should be corrected in an appropriate post-conviction motion.

The material and constitutional difference in discretionary and mandatory application of law has been applied in parole and immigration cases. Although an inmate may fail in his efforts to persuade a parole board to exercise its discretion to grant him parole-just as an alien may fail in his efforts to persuade an immigration judge to exercise her discretion to grant him a deportation waiver-the removal of that discretion would constitute a violation of the *Ex Post Facto* Clause. See, *Scheidemann v INS*, 83 F.3d 1517, 1528. (3rd Cir. 1996). The Third Circuit held that if a discretionary criminal sentence becomes mandatory after the offense is committed, there is an *ex post facto* violation. *United States v. Omoruyi*, 260 F.3d 291 298 n.12 (3d Cir. 2001); See also, *Hameen v. Delaware*, 212r,.3d 226, 243 (3d Cir. 1998). The Ninth Circuit followed the rule of *Lindsey v. Washington* in *United States v. Johns*, 5 F.3d 1267, 1272 (9th Cir. 1993) for an *ex post facto* change in Sentencing Guidelines.

No circuit has applied the *Lindsey* and

Weaver constitutional rule where the defendant is charged with, and found guilty of a general continuing criminal enterprise for a violation § 848 (c), which authorizes a sentencing range from ten years to possible life in prison, but then is punished under § 848(b) to a "mandatory" life sentence without possibility of parole, by will of a judge alone without a indictment count or unanimous verdict for § 848(b) or its additional predicate felony violation requirements.

A Writ of Certiorari is therefore requested since the Ninth Circuit panel's decision that there "there is no material difference between a 'discretionary' life term authorized by section 848(a), and the 'mandatory' life term authorized by section 848(b)," is directly in conflict with the established precedents of the Supreme Court in *Lindsey v. Washington* and *Weaver v. Graham*.

CONCLUSION

The Court should grant certiorari in this case to resolve the important questions which it presents regarding the material and constitutional difference between the "discretionary" life sentence under § 848(a) range from ten years to possibility of life, and "mandatory" life sentence imposed under 21 U.S.C. § 848(b), in light of this Court's precedent in *Lindsey v. Washington*, *supra*, and compared to other sentencing schemes, as in *Blakely v. Washington*, *supra*, *i.e.*, that when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment (citation omitted), and the judge exceeds his proper authority," and the judicially determined mandatory maximum penalty is an "illegal sentence."

It should be first considered whether § 848(b) is a *separate offense*, the elements of which must, consistently with the Due Process Clause of the Fifth Amendment and the jury trial and notice guarantees of the Sixth Amendment, be charged in the indictment and submitted to the jury for a specific and unanimous verdict for each violation and element within the statute on proof beyond a reasonable doubt. As addressed above, it is petitioner's position that § 848(b) defines a separate/more severe/offense than § 848(a) and (c) which carries lesser discretionary sentence range.

If the Court concludes that the facts set forth in § 848(b) are "sentencing factors" rather than elements of a separate offense, it should then consider whether in cases such as this one, in which

a statutory factor is so absolute as to remove all judicial discretion whatsoever from the sentence court and to require that it impose the statutory maximum sentence, the Due Process Clause of the Fifth Amendment requires that that factor be found by the jury beyond a reasonable doubt. The Court should hold that, under such circumstances, it does. Where, as here, that statutory factors mandates that the defendant to spend the rest of his life in prison, the right to due process, and indictment, and specific and unanimous jury verdicts for the statute are more compelling, and the absence of such events should render a § 848(b) mandatory life sentence an illegal sentence *per se*.

For the foregoing reasons, petitioner Michael L. Montalvo respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

RICHARD B. MAZER
99 Divisadero Street
San Francisco, California 94117
(415) 621-4100

Attorney for Petitioner
MICHAEL L. MONTALVO

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 16, 2009

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 07-16762.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL L. MONTALVO,

Defendant-Appellant.

Argued and Submitted March 10, 2009.
Filed Sept. 16, 2009.

Before: J. CLIFFORD WALLACE, SIDNEY R. THOMAS and JAY S. BYBEE, Circuit Judges.

WALLACE, Senior Circuit Judge:

Nearly two decades ago, a jury found Montalvo guilty of operating a continuing criminal enterprise engaged in the sale and trafficking of illegal narcotics. He was subsequently sentenced to life imprisonment. Since then, Montalvo has pursued a multitude of post-conviction motions and appeals seeking relief from his conviction and sentence. Indeed, this is the seventh time

we have been called upon to review the validity of Montalvo's sentence. In the instant appeal, we must determine whether the district court erred in dismissing Montalvo's sixth, and most recent, motion to correct his sentence pursuant to a prior version of Federal Rule of Criminal Procedure 35(a). We first hold that we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Exercising that jurisdiction, we affirm the district court's dismissal of Montalvo's Rule 35(a) motion.

I.

As we recounted during a prior review of Montalvo's conviction and sentence, "[f]rom 1983 until his arrest on May 19, 1987, [Montalvo] was at the helm of . . . a large and extremely well-organized cocaine distribution business based in California." *United States v. Montalvo (Montalvo I)*, Nos. 90-10078, 90-10080, 90-10081, 90-10082, 90-10585 and 90-10586, 1992 U.S. App. LEXIS 18863, 1992 WL 184342, at *1 (9th Cir. Aug. 4, 1992). He operated his drug company "much like a legitimate enterprise," requiring his employees to "dress in business attire, to work 8:00 a.m. until 5:00 p.m. five days a week, and to carry pagers so that they could be easily contacted." *Id.* His employees were forbidden from carrying guns or using drugs themselves. *Id.* We further determined that Montalvo's business "met with tremendous financial success; in 1985, for example, he grossed 68 million dollars in cocaine sales." *Id.*

On March 3, 1989, a grand jury returned a two-count superseding indictment against Montalvo and his

various co-defendants. Count I charged Montalvo and others with belonging to a cocaine conspiracy stretching from June 1982 to May 19, 1987, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count II charged only Montalvo with operating a continuing criminal enterprise during the same time period in violation of 21 U.S.C. § 848. With respect to Count II, we previously determined that the version of section 848 in effect at the time of Montalvo's arrest applies to this case. *United States v. Montalvo (Montalvo III)*, Nos. 94-10108, 94-10110, 1996 U.S. App. LEXIS 15203, 1996 WL 2205, at *1 (9th Cir. June 21, 1996). Therefore, any references to section 848 in this opinion will be to the previous version of that statute.

On October 19, 1989, a jury convicted Montalvo on Count II of the indictment. The district court then sentenced Montalvo to life imprisonment pursuant to its discretionary authority under section 848(a). On appeal, we upheld Montalvo's conviction, but remanded the case for resentencing and for a post-trial review of certain personnel records of government witnesses. *Montalvo I*, 1992 U.S. App. LEXIS 18863, 1992 WL 184342, at *17. Meanwhile, an intervening *coram nobis* petition, construed as a 28 U.S.C. § 2255 petition, also reached us on appeal and was subsequently denied.

Montalvo was resentenced on January 14, 1994. At resentencing, the district court observed that on October 27, 1986, section 848 had been amended to

require a life sentence for any continuing criminal enterprise defendant who was:

> [O]ne, the principal administrator, organizer, or leader of the enterprise or was one of several such principal administrators, organizers, or leaders; and, two, whose enterprise either, A, involved at least 150 kilograms of cocaine, or, B, received $10 million in gross receipts during any twelve-month period of its existence for distributing a controlled substance.

Reviewing the trial record and our decision in *Montalvo I*, the district court held that "[t]here is no question that [Montalvo] met all of these criteria."

The district court also rejected any Ex Post Facto Clause concerns with applying the amended statute to Montalvo's case, holding that intervening case law directs that "the revised penalties of Section 848(b) apply to any continuing criminal enterprise that extended past October 27, 1986, regardless of when it originally began." The district court concluded that "the fact that [Montalvo's] conspiracy continued until the [May 19,] 1987 arrest was established by the trial evidence and has been specifically stated by the Ninth Circuit in affirming [Montalvo's] conviction, as well as [co-defendant Jennifer] Matsuzaki's conviction." Therefore, the district court imposed a sentence of life imprisonment pursuant to section 848(b).

Appendix A

During the next twelve-and-a-half years Montalvo filed five separate Rule 35(a) motions, one pro se section 2255 petition, and four unsuccessful appeals to this court. The instant appeal concerns Montalvo's sixth and most recent Rule 35(a) motion, filed on February 21, 2007, and amended on May 4, 2007. In it, Montalvo argued that his sentence is unconstitutional on multiple grounds and that the sentencing court lacked subject matter jurisdiction over his case. The magistrate judge (MJ) to which this motion was referred ruled that "Rule 35 does not provide a mechanism for review of any of Montalvo's claims, nor should that Rule act as an omnipresent litigation wild card available to a defendant whenever, and however many times, he chooses to play it." Accordingly, the MJ recommended that the motion be dismissed without addressing the merits. The district court adopted the MJ's recommendation in full. This appeal followed.

II.

We first determine whether we have jurisdiction over this appeal. *Symantec Corp. v. Global Impact, Inc.*, 559 F.3d 922, 923 (9th Cir. 2009) ("Although neither party raised the issue of our jurisdiction to entertain this appeal, we have a duty to consider it sua sponte"). Our appellate jurisdiction extends to all "final decisions" of the district courts. 28 U.S.C. § 1291. In criminal cases, a final decision is rendered upon imposition of the defendant's sentence. *Parr v. United States*, 351 U.S. 513, 518, 76 S. Ct. 912, 100 L. Ed. 1377 (1956) (holding that "[f]inal judgment in a criminal case means

sentence"), quoting *Berman v. United States*, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204 (1937).

Here, Montalvo was resentenced in January 1994. His criminal case was therefore reduced to a final appealable decision at that time. He now appeals from the district court's order denying a subsequently-filed Rule 35(a) motion to correct that sentence. Although a Rule 35(a) motion is necessarily a post-conviction, post-sentencing motion, it is deemed filed in the defendant's original criminal case. *Heflin v. United States*, 358 U.S. 415, 418 n.7, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959). As such, the district court's order resolving Montalvo's Rule 35(a) motion merges into the final judgment and is appealable pursuant to section 1291. *Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) ("A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment").

Our decision in *United States v. Arishi*, 54 F.3d 596 (9th Cir. 1995) does not counsel otherwise. In that case, we addressed our appellate jurisdiction over an appeal from a district court's ruling on a Rule 35(b) motion. Rule 35(b), like Rule 35(a), prescribes procedures for the correction and modification of criminal sentences. In *Arishi*, we held that "the exclusive avenue of appeal of rulings on Rule 35(b) motions is 18 U.S.C. § 3742." *Id.* at 599. In so ruling, we rejected the defendant's contention that section 1291 provides an independent statutory basis for jurisdiction over the appeal.

We reasoned that section 3742 evidenced Congress' intent to restrict sentencing appeals to the statutorily-created criteria delineated in that section. *Id.* at 598-99, citing *United States v. Chavarria-Herrara*, 15 F.3d 1033, 1035-36 (11th Cir. 1994). Therefore, we held, section 1291 did not supply jurisdiction over the appeal.

Arishi does not preclude the exercise of section 1291 jurisdiction over the instant appeal. Section 3742 governs only those appeals from sentences based on offenses committed after November 1, 1987. *United States v. Byerley*, 46 F.3d 694, 699 (7th Cir. 1995), citing Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1987), *overruled on other grounds by, United States v. Clark*, 538 F.3d 803 (7th Cir. 2008). In this case, Montalvo's sentence is based on offenses committed prior to that date. Therefore, section 3742 does not dictate the terms of this appeal. Rather, the general provision for appellate jurisdiction provided in section 1291 applies. *See United States v. McAndrews*, 12 F.3d 273, 276 (1st Cir. 1993) (stating that "[p]rior to the advent of guideline sentencing," a criminal defendant could invoke section 1291 in order to appeal his sentence). As described above, our jurisdiction pursuant to that section is secure.

III.

With respect to the merits of this appeal, Montalvo argues that the district court erred in ruling that Rule 35(a) does not provide an appropriate vehicle for correcting the alleged errors in his sentence. We review a district court's interpretation of the Federal Rules of

Criminal Procedure de novo. *United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004). The parties agree that the version of Rule 35 in effect before November 1, 1987, the effective date of the Sentencing Reform Act, applies to this case. Thus, our analysis of Montalvo's Rule 35 motion will rely on that prior version of the rule.

A.

Rule 35(a) provides that "[t]he court may correct an illegal sentence at any time . . . ." Fed. R. Crim. P. 35(a) (1987). In *Hill v. United States*, the Supreme Court held that Rule 35 performs the "narrow function" of correcting an "illegal sentence," and is not meant to permit the "re-examin[ation of] errors occurring at the trial or other proceedings prior to the imposition of sentence." 368 U.S. 424, 430, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962); *see also Heflin*, 358 U.S. at 418 (holding that the "only question" on a Rule 35(a) motion is "whether the sentence imposed was illegal *on its face*" (emphasis added)). The Court explained that a sentence is not "illegal" pursuant to the rule where "[t]he punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect." *Hill*, 368 U.S. at 430.

In *United States v. Fowler*, we clarified the scope of Rule 35(a) as a mechanism for correcting a given sentence. 794 F.2d 1446, 1449 (9th Cir. 1986). As part of

the defendant's sentence for willfully filing false income tax returns, the district court ordered the defendant to pay costs pursuant to 26 U.S.C. § 7206 in the full amount claimed by the government. *Id.* at 1448. Rather than appealing his sentence, the defendant filed a petition in district court, which the district court construed as a section 2255 petition. *Id.* The petition argued that (1) interpreting section 7206 as mandating the imposition of costs "causes an unconstitutional 'burden' on the right to cross-examination, jury trial, and compulsory process," and (2) even if section 7206 mandates the assessment of costs, the district court was not authorized to impose all of the costs of prosecution on the petitioner because he was acquitted on one count of the indictment. *Id.* at 1449.

On appeal, we held that "[w]e need not address whether Fowler's claims are cognizable under section 2255, because we may treat his petition as a motion to correct an 'illegal' sentence under [Rule] 35." *Id.* at 1448, citing *Brooks v. United States*, 457 F.2d 970, 971 n.1 (9th Cir. 1972). In so ruling, we interpreted the term "illegal sentence" under Rule 35(a) to include "a sentence which is not authorized by the judgment of conviction, or in excess of the permissible statutory penalty for the crime, or in violation of the [C]onstitution." *Id.* at 1449 (internal citations and quotation marks omitted). We held that "[b]ecause Fowler attacks the 'legality' of the sentence, we may treat his section 2255 petition as a motion under Rule 35." *Id.*

By contrast, in *United States v. Johnson*, we held that the defendant's challenges to his sentence were not cognizable under Rule 35(a). 988 F.2d 941, 943 (9th Cir. 1993). In *Johnson*, the defendant was convicted and sentenced on a charge of being a felon in possession of a firearm in violation of 18 U.S.C. § 1202(a), *repealed by* Pub. L. 99-308, § 104(b), 100 Stat. 459 (May 19, 1986). *Id.* at 943. He sought relief from his sentence via a Rule 35(a) motion, arguing that he was "excluded from the class of felons otherwise prohibited from possessing firearms" by section 1202(a). *Id.* at 944. We held that his motion was improper because "[h]is pleadings . . . do not contend his sentence is unauthorized by the judgment of conviction, exceeds the permissible statutory penalty of his crime, or violates his constitutional rights." *Id.*, citing *Fowler*, 794 F.2d at 1449.

B.

In this case, Montalvo launches several challenges to his sentence.

1.

Montalvo first argues that, by sentencing him to a mandatory life term under section 848(b), the district court "exceeded its jurisdiction [and] imposed a sentence on Montalvo for an offense for which he had never been indicted." He argues that section 848 "actually sets forth two offenses" — "[s]ubsection (a) sets forth a penalty of 10 years to life for a first conviction and a penalty of 20 years to life for a second or subsequent conviction";

subsection (b) sets forth what "could properly [be] characterized as an 'aggravated' continuing criminal enterprise," carrying a mandatory life term, and requiring additional "elements" to be proven. Montalvo argues that his "illegal mandatory life sentence must be corrected to a term authorized by the facts reflected in the basic verdict for a continuing criminal enterprise."

It appears that Montalvo argues that he was convicted of a "basic" continuing criminal enterprise pursuant to section 848(a), but sentenced for an "aggravated" continuing criminal enterprise pursuant to section 848(b). So construed, this argument is cognizable under Rule 35(a). *Fowler*, 794 F.2d at 1449 (holding that Rule 35(a) can be used to challenge sentences that are "not authorized by the judgment of conviction").

However, Montalvo's challenge fails on the merits. Even assuming that Montalvo's construction of section 848 as setting forth two distinct offenses is correct, both 848(a) and 848(b) authorize a sentence of life imprisonment, which is precisely what Montalvo received. Contrary to Montalvo's contention, there is no material difference between the "discretionary" life term authorized by section 848(a), and the "mandatory" life term authorized by section 848(b). As we held in a previous appeal of Montalvo's sentence, "[t]he life sentence without the possibility of parole that Montalvo received at resentencing was the same sentence he received at his earlier sentencing." *Montalvo III*, 1996 U.S. App. LEXIS 15203, 1996 WL 2205, at *2.

2.

Montalvo next argues that his sentence is the product of "unconstitutional structural error because the sentencing judge alone . . . found defendant was guilty of the hypothetical felonies for the [section] 848(b) mandatory life sentence without indictment counts or jury trial and verdicts for the alleged felonies." Thus, he argues that his sentence represents a "directed verdict for the prosecution during sentencing" on those "hypothetical felonies," resulting in a "denial of [his] right to [a] jury trial" under the Constitution.

This claim cannot be properly heard as a Rule 35(a) motion. Although Rule 35(a) is available to correct sentences that are "in violation of the Constitution," *Johnson*, 988 F.2d at 943, the constitutional infirmity must be apparent in the "terms of the sentence itself," *Hill*, 368 U.S. at 430. Thus, in *Fowler* we construed a section 2255 petition as raising a valid Rule 35(a) challenge where the petitioner argued that the terms of the sentence, which imposed on him the costs of prosecution, caused an "unconstitutional 'burden' on the right to cross-examination, jury trial, and compulsory process." 794 F.2d at 1449.

This distinction between the illegality of the terms of a sentence as opposed to the illegality of the process by which it was imposed makes sense given the text of the rule. Rule 35(a) distinguishes between an "illegal sentence" and a "sentence imposed in an illegal manner." Fed. R. Crim. P. 35(a) (1987). The rule allows the court

to correct an "illegal sentence" at any time, but only allows the court to correct a sentence "imposed in an illegal manner" if a Rule 35(a) motion is made within specific time limits pronounced in the rule. *See* Fed. R. Crim. P. 35(b). If the term "illegal sentence" included sentences that were the product of errors, constitutional or otherwise, committed in the process of sentencing, there would be no need for the "illegal manner" language in Rule 35(a). *See United States v. Novak*, 476 F.3d 1041, 1048 (9th Cir. 2007) (stating that courts should "avoid whenever possible statutory interpretations that result in superfluous language"); *see also United States v. Stevens*, 548 F.2d 1360, 1362 n.8 (9th Cir. 1977) (recounting that the "illegal manner" language was added to Rule 35 to "change the result in [*Hill*, 368 U.S. at 430] where the then Rule 35 was held to be inapplicable to correct a sentence imposed without granting the defendant the right of allocution").

In this case, Montalvo does not allege that terms of his sentence are unconstitutional. Instead, he faults the district court for allegedly "direct[ing] a verdict for the prosecution" on felonies never charged in the indictment or submitted to the jury, and then sentencing him on those uncharged felonies. But these arguments challenge the *process* by which the sentence was imposed, not the *terms* of the sentence. Indeed, Montalvo does not dispute that a mandatory life sentence is authorized where a defendant is properly found to have satisfied the criteria set forth in section 848(b). Rather, he argues that that finding must be made by a jury, not by a judge. Montalvo cannot raise

such a process-based challenge in a Rule 35(a) motion. Any motion challenging his sentence because it was "imposed in an illegal manner" would have to have been brought within 120 days of his resentencing in 1994, and Montalvo did not do so. *See* Fed. R. Crim. P. 35(a), (b) (1987).

3.

Finally, Montalvo argues that his sentence was unconstitutional because the district court "determined the end-dates of the conspiracy, and all the alleged drug offenses and money offenses the defendant supposedly committed, without a jury determination of those dates and felonies." Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), he argues that "it is unconstitutional for a judge alone, not the jury, to make factual determinations that elevate the crime of conviction to a greater offense." Again, however, Montalvo's claim here challenges the constitutionality of the manner in which his sentence was imposed — he argues that the district court erred in finding facts relevant to the sentence without submitting those facts to the jury. As described above, this challenge is not cognizable under Rule 35(a) because it was not brought within 120 days after the sentence was imposed in 1994. *See* Fed. R. Crim. P. 35(a), (b) (1987).

IV.

For the reasons set forth above, we hold that we have jurisdiction over this appeal, and we conclude that Montalvo cannot proceed with his Rule 35(a) motion to correct his sentence. Montalvo has had multiple opportunities to raise and argue these challenges to his sentence in the decades since his conviction. He cannot now use Rule 35 to pursue yet another. Accordingly, we affirm the district court's order of dismissal.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED AUGUST 7, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CR S-89-0062 WBS GGH P

UNITED STATES OF AMERICA,

Respondent,

vs.

MICHAEL L. MONTALVO,

Movant.

ORDER

Movant, a federal prisoner proceeding pro se, has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On June 28, 2007, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. On July 12, 2007,

movant filed objections to the findings and recommendations and supplemental objections on July 26, 2007.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed June 28, 2007, are adopted in full;

2. Montalvo's Amended Motion to Correct an Illegal Sentence filed May 4, 2007, is dismissed;

3. All other pending motions, including motions for reconsideration, are DENIED.

Dated: August 6, 2007

s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX C — AMENDED FINDINGS & RECOMMENDATIONS AND ORDER DATED JUNE 28, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CR S-89-0062 WBS GGH P

UNITED STATES OF AMERICA,

Respondent,

vs.

MICHAEL L. MONTALVO,

Movant.

AMENDED
FINDINGS & RECOMMENDATIONS AND ORDER[1]

Introduction and Summary

Believing that federal criminal actions are always open to collateral attack, if one only chooses the right words or procedural vehicle, defendant Montalvo brings his fifth Fed. R. Crim. Pro. 35 motion (having also made multiple appeals and 28 U.S.C. § 2255 motions) to overturn his "sentence." This motion should be dismissed.

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1. Amending language only, and inserting for the Rule 35 F & Rs "dismissed" for "denied".

Appendix C

As to a second matter referred to the undersigned, Montalvo filed objections to the Findings and Recommendations regarding Montalvo's successive 28 U.S.C. § 2255 motion (brought under the rubric of a Fed. R. Civ. P 60(b) motion). Within the course of that objection process, Montalvo brought a Motion to Bifurcate at Oral Argument [on objections] the Issues of Civil Rule 60(b) etc. This specific motion was referred to the undersigned. However, because the district judge issued a final order adopting the Findings and Recommendations and dismissing the motion (thereby declining to hold oral argument), Montalvo's "Birfurcation" motion is moot. Except as set forth in the footnote below, nothing more will be said on this motion.[2]

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2. Despite Montalvo's repetitive assertions that there were "ordinary" 2255 issues which were successive, and "Rule 60(b)" issues which were not, the point of the Findings and Recommendations, adopted by the district judge, was that *all* of the issues were successive no matter how denominated by Montalvo. Repetition of a supposed dichotomy in subsequent motions will not change this fact.

Montalvo has also, pursuant to Fed. R. Civ. P. 59(e), filed a motion for reconsideration of the final order of the district judge dismissing the successive § 2255 motion. The Motion to "Birfurcate" cannot apply to such a motion because that reconsideration motion is most probably untimely, and presumably will be dismissed on that basis. (Not counting weekends, the tenth and final day for filing the motion for reconsideration under Rule 59(e) was June 13, 2007. The filing on June 14 (docket number 1020) is untimely.) The three day mail provisions of Rule 6 are inapplicable to a Rule 59(e) motion. *Parker v. Board of Public Utilities of Kansas City*, 77 F.3d 1289, 1291 (10th Cir. 1996).

Appendix C

Procedural Facts

The multitudinous post-trial procedural history of this case has been well set forth in the opposition filed by the United States and will not be repeated; it is merely summarized here - six appeals, two § 2255 motions, five Rule 35 motions, and countless sub-motions within those proceedings. Suffice it to say that the present Rule 35 motion is the fifth motion filed, and even within the "fifth" motion there have been four iterations or amendments. As provided in the court order of June 22, 2007, the amended motion filed May 4, 2007 (Docket # 1010) is the operative Rule 35 motion which will be addressed.

Discussion

Montalvo's Rule 35 motion raises several issues, all but one of which raise the same point in a multitude of ways — the contention that the sentencing judge utilized facts which should have been determined by a jury:

a. Montalvo's sentencing violated *Blakely v. Washington* [542 U.S. 296, 124 S. Ct. 2531 (2004)];

b. the sentencing court lacked jurisdiction because the re-sentencing facts were "hypothetical felonies" which had not been indicted or proved to a jury;

c. the Double Jeopardy Clause was violated when the re-sentencing court utilized the additional "felonies;"

d. the sentence was unconstitutional because the judge determined facts, i.e., the end date of the conspiracy;

e. use of the "other felonies" at re-sentencing never charged in an indictment was structural error;

f. Montalvo did not have retained counsel of his choice at re-sentencing.

The government is correct that Rule 35 does not provide a mechanism for review of any of Montalvo's claims, nor should that Rule act as an omnipresent litigation wild card available to a defendant whenever, and however many times, he chooses to play it.

As the District Judge has written for a previous Rule 35 motion: "[b]ecause defendant's offenses were committed prior to November 1, 1987, the pre-Guidelines version of Rule 35 applies to defendant's motion." Order June 3, 2003. Under that version, "'[t]he court may correct an illegal sentence at any time. . . .'" *Id.*

The term "illegal sentence," however does not refer to any and every error at trial or sentencing that allegedly infects the sentence. For example, where one claims, as Montalvo does here, that the trial court lacked jurisdiction to impose a sentence:

> Where a defendant seeks to attack the basis for his conviction, the district court may

> properly construe the defendant's Rule 35 motion as a motion under 28 U.S.C. § 2255. *United States v. Brown*, 413 F.2d 878, 879 (9th Cir.1969), cert. denied, 397 U.S. 947, 90 S.Ct. 965, 25 L.Ed.2d 127 (1970). The court should do so where-as here-the defendant alleges that the court lacked jurisdiction to impose the sentence, because "a Rule 35 proceeding contemplates the correction of a sentence of a court having jurisdiction," whereas "jurisdictional defects . . . . must ordinarily be presented under 28 U.S.C. § 2255." *Gilinsky v. United States*, 335 F.2d 914, 917 (9th Cir.1964). Thus, the district court properly treated Mathews' motion as a motion under section 2255.

United States v. Mathews, 833 F.2d 161, 163 (9th Cir. 1987).[3]

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3. The undersigned has previously found that the jurisdictional defect alleged herein should have been brought in the *first* § 2255 motion, and thereafter, a second § 2255 motion alleging a jurisdictional defect would be barred in the district court as a successive petition. Montalvo's assertion that a jurisdictional defect is always open to review has long ago been repudiated.

> A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional

(Cont'd)

Appendix C

The government has correctly interpreted *Hill v. United States*, 368 U.S. 424, 82 S. Ct. 468 (1962) which limited "illegal" sentences to those which were illegal on their *face* as to their *terms*. *Id.* at 430, 82 S. Ct. at 472. Indeed, the *Hill* case was the precipitating factor in amending Rule 35 to specify a 120 day window to challenge the *manner* in which the sentence was imposed. Advisory Committee Notes to Rule 35, 1966 amendment. *See also United States v. Weichert*, 836 F.2d 769, 772 (2nd Cir. 1988). Of course, the manner in which Montalvo's sentence was imposed , i.e., where the judge

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(Cont'd)

> determinations-both subject matter and personal. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938).

Insurance Co. of Ireland v. Compagnie Bauxites etc, 456 U.S. 694, 702 (n.9), 102 S. Ct. 2099, 2104 (1982). By statute, a criminal defendant is given one opportunity to challenge collaterally a defect in the court's jurisdiction, and thereafter, unless excused by the Ninth Circuit in terms of permitting a successive § 2255 petition, the issue of a defect in subject matter jurisdiction has been waived.

And of course, if one could have raised the issue but did not, the issue of subject matter jurisdiction still may not be raised outside of the ordinary process for contesting such. *Chicot County, supra.*

Thus, there is no cause to treat the instant claim as one brought pursuant to 28 U.S.C. § 2255 — the court has been there and adjudicated that.

was the factfinder in lieu of a jury, is precisely the assertion that runs throughout Montalvo's most recent Rule 35 motion with the exception of his retained counsel assertion. "If the Court must go 'behind the scenes' and examine the validity of the findings or proceedings that led to the sentence, it must proceed under the [120 day] alternative provision in Rule 35(a) that governs sentences imposed 'in an illegal manner.'" Government Opposition at 6 citing *United States v. Johnson*, 988 F.2d 941, 943 (9th Cir. 1993). "'An illegal sentence may be corrected at any time, but a motion to . . . correct a sentence imposed in an illegal manner must be made within the 120-day period prescribed by Rule 35.'" *Johnson* at 943 quoting *United States v. Stump*, 914 F.2d 170, 172 (9th Cir. 1990) which in turn cites *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986) for the same proposition. *See also United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc) citing *Johnson* with approval.[4] And this is so no matter how Montalvo purports to label his legal theories, e.g, jurisdiction, double jeopardy, structural error, constitutional violation. When one looks behind the labels, Montalvo's contention that the sentencing judge decided facts he should not have, a *Blakely* issue, is the singular contention made.

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4. Who decides the sentencing facts - judge or jury, is a manner of sentencing issue. *See also United States v. Peltier*, 446 F.3d 911, 913 (8th Cir. 2006) (defective jurisdiction allegation in near thirty year old case not reviewable on a Rule 35 motion); *United States v. Willis*, 804 F.2d 961, 964 (6th Cir. 1986) (claims of ineffective assistance of counsel, invalid guilty plea, and error in not allowing withdrawal of guilty plea not cognizable under Rule 35).

Appendix C

With respect to the claim that Montalvo was denied the right to proceed with retained counsel citing *United States v. Gonzalez*, 548 U.S. __, 126 S. Ct. 2557 (2006), such a claim requires that the court go behind the scenes, possibly hold an evidentiary hearing, and adjudicate the matter. The claim is the antithesis of a facial claim that a sentence is illegal; it again involves the procedures at issue during sentencing. Moreover, Montalvo concedes that he raised this argument long ago. Montalvo's assertions that the Court of Appeals in previous appeals missed his real argument, or decided it incorrectly, is the stuff of which motions for rehearing are made. They are not the stuff of years later collateral attack.

Montalvo's omnibus theory — if the manner of sentencing is illegal, the sentence is "illegal" and challengeable at "any time" — also falls victim to common sense. A great deal of jurisprudence has grown up around the principle of retroactivity on collateral review of Supreme Court decisions. *See* e.g., *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and its progeny. For example, the principles of *Blakely* (an error which if existing affects the legality of the manner of sentencing, have been determined *not* to be retroactive to cases on collateral review). *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005) (*Booker* error). It challenges common sense to believe that simply because one utters the words "Rule 35," all of this manner-of-sentencing jurisprudence flies out the window, and *all* recently decided Supreme Court cases, including *Blakely*, are

potentially applicable, even if, as in the case of Montalvo, they have been decided 10 or more years after final, appellate direct review. And, this sleight of hand may occur simply because a lawyer can somehow craft a pleading which alleges that an error of constitutional magnitude infected the sentence thereby making it "illegal." Nor, according to Montalvo, does it matter when in the proceedings the error occurred; here Montalvo alleges, in part, that the error which affected the sentence occurred as early as the indictment. One might wonder what the purpose of *Teague* would be since every significant error could easily be phrased as one "affecting the sentence," and fit a due process or other Constitutional rubric. This is why Rule 35 has been interpreted narrowly to apply only to illegality in the *substance* of sentencing errors. Correcting all possible errors which affect a sentence's "legality" "at any time" would work a finality mischief that no rules draftsman would permit. *See United States v. Comarovschi*, 359 F. Supp. 2d. 532 (W.D. Va. 2005) refusing to apply *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005) retroactively on a Rule 35 motion.

By the very terms of Rule 35 then in effect at the time the crimes of conviction were committed, the undersigned has no doubt that errors on the face of the sentence or substantive constitutional errors are reviewable "at any time." *See also* cases cited by Montalvo post-dating the inclusion of the 120 day "manner of sentencing" provisions of Rule 35. However, that very narrow species of error is not at issue in this fifth Rule 35 motion.

Appendix C

Conclusion

IT IS HEREBY ORDERED that the Motion to Bifurcate, etc., filed May 24, 2007, is denied as moot:

IT IS HEREBY RECOMMENDED that Montalvo's Amended Motion to Correct Illegal Sentence filed May 4, 2007, should be dismissed, and the merits of the contentions should not be reached.[5]

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within *five* days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: 6/28/07

/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE

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5. The undersigned agrees with the government that Montalvo's repeated, and seemingly never ending, challenges should not be decided on their merits in the alternative, as Montalvo has no right to abuse his right of access to the courts. Judicial resources are a zero sum game. The court's constant attention to the 1989 Montalvo case jeopardizes its ability to pay due attention to the claims of other litigants.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 10, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-16762

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL L. MONTALVO,

Defendant - Appellant.

D.C. Nos. CV-07-COA-Postjgmt
CR-89-00062-WBS
Eastern District of California, Sacramento

ORDER

Before: WALLACE, THOMAS and BYBEE, Circuit Judges.

Judge Thomas and Judge Bybee have voted to deny the Petition for Rehearing En Banc, and Judge Wallace so recommends.

Appendix D

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing En Banc is DENIED.

No. 09-1306

In The
Supreme Court Of The United States

October Term, 2009

MICHAEL L. MONTALVO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING OF AN ORDER DENYING A PETITION FOR WRIT OF CERTIORARI

RICHARD B. MAZER
Law Offices of Richard B. Mazer
99 Divisadero Street
San Francisco, California 94117
(415) 621-4100

Attorney for Petitioner

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Michael L Montalvo, through undersigned counsel, respectfully petitions this Court to reconsider its order of June 1, 2010, in which the Court denied Mr. Montalvo's petition for writ of certiorari. This petition is brought pursuant to Supreme Court 44.2, and is made in good faith and not for reasons of delay.

The reason for this petition for rehearing is that only a week prior to the order denying Mr. Montalvo's petition, and a month after the petition in this case had already been filed, this Court issued its decision in *United States v. O'Brien*, No. 08-1569, ___ U.S. ___, ___ S.Ct. ___, 2010 WL 2025204 (U.S.), 78 USLW 4441 (May 24, 2010).

For the reasons set forth below, petitioner submits that the *O'Brien* case is highly relevant to

the issues presented for review in Mr. Montalvo's petition, and that this recent decision may have reasonably been overlooked by the Court at the time it denied Mr. Montalvo's petition for writ of certiorari. Thus, petitioner seeks reconsideration of Mr. Montalvo's issues presented for review in light of the recent decision in *United States v. O'Brien, supra*, in support of the question presented for review in this case, namely whether 21 U.S.C. § 848(b) is a separate greater offense from the basic offense charged in § 848, operating a Continuing Criminal Enterprise, and not a sentencing factor within a single offense.

BRIEF STATEMENT OF FACTS AND CASE

A complete statement of facts and the lengthy history of Mr. Montalvo's case is set forth in the

petition for writ of certiorari and in the underlying opinion and judgment of the United States Court of Appeals for the Ninth Circuit, also included in the petition for writ of certiorari.

In summary, Mr. Montalvo was convicted over twenty years ago of operating a continual criminal enterprise in violation of 21 U.S.C. § 848. After an initial appeal resulted in a new sentencing hearing, he was resentenced in 1994 to mandatory life imprisonment pursuant to § 848(b). Under that subsection, a sentence of life is mandatory if the defendant handles a requisite substantial amount of drugs or money through the enterprise. At the time, § 848(b) was considered to be a sentencing factor to be determined by the sentencing court.

Because of the age of this case, former Federal Rule of Criminal Procedure 35(a) is still applicable

to Mr. Montalvo. Thus, independent of any limitation on habeas review under 28 U.S. 2255, Mr Montalvo's sentence can be reviewed at any time under former Rule 35(a) if his sentence is "illegal" under that former rule.

Mr. Montalvo's claim before this Court is that his sentence of mandatory life imprisonment under 21 U.S.C. § 848(b) was an illegal sentence, because § 848(b) is a separate greater offense than the regular continuing criminal enterprise offense under § 848(c) because subsection (b) contains different factual elements and it raises the minimum penalty from ten years imprisonment to mandatory life imprisonment. Since Mr. Montalvo was neither charged in the indictment with § 848(b), nor were the relevant factual questions under §848(b) as to the amount of drugs or money involved ever

submitted to the jury, he was illegally sentenced for an offense that he was neither charged with, and is entitled to have a new sentencing hearing where he can argue for a reasonable sentence in line with the sentencing guidelines and the sentences received by codefendants.

THE RECENT DECISION OF *United States v. O'Brien* SUPPORTS DEFENDANT'S CLAIMS PRESENTED FOR REVIEW BY THIS COURT.

In *United States v. O'Brien*, No. 08-1569, ___ U.S. ___, ___ S.Ct. ___, 2010 WL 2025204 (U.S.), 78 USLW 4441 (May 24, 2010), this Court recently held, in a unanimous judgment, that under 18 U.S.C. §924 (c), using or carrying a fully automatic machine gun during a crime of violence, as compared to use of a semi-automatic gun, was a separate offense, and not a sentencing factor, and the use of

the machine gun had to be charged by indictment and proven beyond a reasonable doubt. A major factor in the Court's deciding that the pertinent subsection of § 924(c) was a separate crime was that the increase in mandatory minimum punishment, from not less than 5 to not less than 30 years imprisonment, was a significant difference in punishment.

In his concurring opinion, Justice Stevens was clear about the effect of the Court's decision.

> As Justice THOMAS eloquently explained in his dissent in *Harris v. New York*, 536 U.S. 545, 572, 122 S.Ct. 2406, 152 L.Ed.2d 524 (2002), the reasoning in our decision in *Apprendi* applies with equal force in the context of mandatory minimums. There is, quite simply, no reason to distinguish between facts that trigger punishment in excess of the statutory maximum and facts that trigger a mandatory minimum.
> . . . Mandatory minimums may have a particularly acute practical effect in

> this type of statutory scheme which contains an *implied* statutory maximum of life, see *ante*, at ····. There is, in this type of case, no ceiling; there is only a floor below which a sentence cannot fall.

United States v. O'Brien, J.STEVENS, concurring, at 2010 WL 2025204 (U.S.), p.13.

In this case, 21 U.S.C. § 848 contains an express statutory maximum of life imprisonment.

In this case, Mr. Montalvo was clearly sentenced to mandatory life imprisonment for an offense that was neither charged by indictment nor submitted for the jury's deliberation. As in the recent case of *United States v. O'Brien, supra,* a subsection of a statute that creates a separate offense must be charged and found true beyond a reasonable doubt before that subsection's harsher punishments can be applied. Otherwise, the sentence is illegal.

CONCLUSION

Petitioner respectfully requests this Court to reconsider its previous order in this case denying the petition for writ of certiorari, and instead release the great power of that writ to allow further review of Mr. Montalvo's claim that he has been illegally sentenced and is entitled to a new sentencing hearing. The Fifth and Sixth Amendments to the United States Constitution demand nothing less.

Respectfully submitted,

RICHARD B. MAZER
99 Divisadero Street
San Francisco, California 94117
(415) 621-4100

Attorney for Petitioner
MICHAEL L. MONTALVO

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.